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Supreme Court of the United States

October Term, 1960

No. 166

PETER HOLM,

Petitioner,

against

AMERICAN SHIP BUILDING COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Statement

This reply brief by petitioner is in answer to statements set forth on several pages of respondent's brief in opposition to this petition.

On page 2: Respondent's statement implying that the boarding ladder was available for use by petitioner during the repair period involved herein is incorrect. A boarding ladder was available for use during the navigation season and was evidently available for use aboard another ship during a pervious winter. There was nothing in the record to show whether that other ship was being repaired or the conditions existing thereon. The proof however was that in the instant case the ship's ladder was not used during this particular lay-up. The gangway provided by respond-

ent was in place when petitioner arrived to take on his duties as shipkeeper (50).[1]

On page 3: The vessel may well have been equipped with the regular boarding ladder but it was not in use during the period involved herein. Petitioner used the gangway provided by respondent for four months without any demand by respondent that he stop. The ladder was not available at any time. Testimony showed that the gangway was the sole means of access to and egress from the vessel, as stated by petitioner (37-38) and by respondent's general manager of the shipyard, still employed by respondent at the time of trial (126).[2]

The testimony was to the effect that the platform was secured to the side of the ship at deck level, that the gangway was then bolted to the platform. The platform and gangway moved with the ship and was not attached to the dock. A concrete roller was placed under the lower end of the gangway to facilitate the movement of the gangway with the ship.

On page 7: Nothing in the trial record substantiates an assertion by petitioner of a specific theory of liability, to the exclusion of his maritime rights. An allegation of applicable law was in the complaint. General maritime law principles were not rejected by petitioner. The question involved is whether the District Court recognized the jurisdictional issue involved, considered it and then erroneously rejected the applicability of maritime principles.

On page 8: Nothing in the trial transcript suggests that the the Court did not consider the applicability of

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[1] Pages of the Trial Minutes.

[2] Since both hands are used in ascending a boarding ladder, how petitioner could have used such a ladder with safety while carrying packages of food and other incidentals necessary for living aboard the vessel, remained unanswered by the Courts below.

admiralty principles. On the contrary, the Trial Judge's statement expressly rejecting said principles is clearly shown on page 137. Exception to the decision was properly made.

Petitioner's position in the Court of Appeals was the same as it is herein. Maritime principles applied in this matter because the accident occurred on the gangway of the vessel, an appliance of the ship, in navigable waters. Locale gave rise to the maritime jurisdiction. The District Court did not reject that maritime jurisdiction because of the failure of petitioner to announce the applicability of the general maritime law. The Court believed that since the gangway was owned by respondent rather than the shipowner, maritime principles were inapplicable since petitioner was not employed by respondent (137) who was in the business of repairing the ship (138) and who attached the gangway to the ship only for use of its own employees (138). The allegations in the complaint were used as a crutch by the Trial Court to justify its conclusions of law.

On page 9: The issue of "choice of law" is not involved where there is no choice available. In this case only maritime jurisdiction was available to the plaintiff since the accident occurred aboard a ship located in navigable waters at the time of the accident. As such, there was no conscious choice of one of two applicable legal remedies but rather allegations of fact which conclusively established the applicability of admiralty principles. The allegations of common law applicability were incorrect, were surplusage and immaterial. The sole question was whether the Trial Judge understood the issues and made a conscious determination of which law was applicable.

On pages 9, 10, 11: Respondent cites *Curd* v. *Todd*, 213 F. 2d 864 in support of its position. That case may be distinguished as follows: (1) Curd was a jury verdict. The case at bar was a directed verdict by the Trial Judge.

The question herein was whether the Court was correct in its ruling as to applicable jurisdiction. In the *Curd* case the Trial Court made its decision, no objection was taken and the jury was then charged on the basis of that jurisdictional determination. The charge then became the law of the case, not necessarily the correct law, but simply the law of the case. Failure to except to the charge destroyed the issue on appeal; (2) Curd was on the vessel for the exclusive benefit of the shipowner. Petitioner was on the vessel involved herein for the mutual benefit of the shipowner and respondent. The evidence of that dual capacity was erroneously held inadmissible by the Trial Judge (120-123).

On page 12: *Virginian* v. *Mullens*, 271 U. S. 220 (1926) was decided before promulgation of the Federal Rules. Only tort liability was pleaded. The issue of contractual liability did not arise during the trial, was never defended by the defendant and so could not be brought up on appeal. In the case at bar, the Trial Judge recognized that there was a question of admiralty jurisdiction and expressly rejected it. Respondent herein could not have been further aided by any defense he might have pleaded to the applicability of maritime jurisdiction, since the motion for the directed verdict was granted.

On pages 12, 13, 14: *Valley* v. *Wattawa*, 244 U. S. 202 (1917) and *Nelson* v. *County*, 362 U. S. 1, held only that Constitutional questions not raised in the Courts below would not be considered by this Court for the first time. In the case at bar the Trial Judge considered and rejected the applicability of admiralty jurisdiction. The Court of Appeals further rejected the contention that maritime principles were involved when the issue was specifically raised on appeal.

On page 15: Petitioner's statement was not glib but was grounded upon decisions by this Court and others

throughout the nation. Locale was the sole test of applicability of admiralty jurisdiction. A gangway has repeatedly been held to be a part of the ship regardless of its owner. The gangway herein was the ship's appurtenance not only as a means of access and egress to and from the ship but also for a second vessel moored outboard to the vessel involved herein. Though neither owned nor furnished by the shipowner, it was for the convenience of petitioner as shipkeeper as well as for the four hundred repairmen using the gangway daily. Certainly the gangway was not attached specifically for petitioner's use but he used it exclusively for four months. No ladder or other means of access was given him. If he did not have express consent of respondent he certainly had its acquiescence since respondent admittedly knew of its use and permitted petitioner to continue, knowing that there was no other way that he could safely board the ship when carrying any articles. The fact that the ship had a ladder, not in use during the lay-up because of the employment of the gangway, does not even imply that the petitioner was thus afforded another means of access to the vessel.

On page 16: *Admiral Peoples*, 295 U. S. 649, stated that the gangway was part of the ship and that an accident occurring on the gangway was within the maritime jurisdiction. The decision was further affirmation of the well settled rule that locale was the sole test of admiralty jurisdiction. All cases having the question raised have reached the same conclusion—without exception.

Vega v. *United States*, 86 F. Supp. 293, aff'd 191 F. 2d 921,[3] concerned a maritime worker, employed by a general

[3] The *Vega* case was first called to petitioner's attention by Judge Pope at oral argument in the Court below. Petitioner was not familiar with the case and was requested to distinguish *Vega* from the case at bar in a reply brief. Noteworthy is the fact that *Vega* was not cited by the Court below in its opinion. *Vega* was, in fact, a further implication that if the platform on which the accident occurred was attached to the vessel and was not nailed and bolted to the pier, admiralty jurisdiction would have been held applicable.

contractor, who was injured on a pier platform. The vessel moored at the pier, was afforded a gangway by the contractor, which gangway was attached to the vessel and which rested at its lower end upon rollers (thus permitting the ship and the gangway to surge with the tide), in turn resting upon the "platform eight to twelve inches above the level of the pier to which it was nailed and bolted". Plaintiff slipped not upon the gangway attached to the ship but upon the pier platform nailed and bolted to the pier.

The Court held that the suit, against the United States, was subject to Title 46 U. S. C. § 740 which, prior to its amendment did not provide for an action to lie against the government if the accident occurred "on land owned by a vessel in navigable waters". The pier platform was then deemed an extension of the land since it was to the land that it was bolted.

Even in absence of the issues pertaining to the interpretation of the statute, the *Vega* case was clearly distinguishable from the case at bar in which the accident occurred on the gangway attached to the ship—not on a platform attached to the pier.

Petitioner's statement in the petition was neither glib nor in error. The gangway leading to a ship has always been considered an appurtenance thereof. No distinction has been made on the issue of ownership of the equipment. *Ford v. Parker*, 52 F Supp. 98; *Caldaro v. Baltimore*, 166 F. Supp. 833.

See also: *Alaska v. Petterson*, 205 F. 2d 478, aff'd 347 U. S. 396, in which equipment brought aboard the vessel by stevedores was held to be part of ship's equipment under the doctrine of seaworthiness. The same rights would be applicable under negligence concepts if there was notice that the equipment was aboard the ship and of its defective condition. Both elements were herein present.

Aho v. *Jacobsen*, 249 F. 2d 309, is a noteworthy example of discredited law. The case concerned an injured seaman suing a shipowner of another vessel lying inboard to his own ship and upon which he had to pass in order to go to and from the pier. The Court held the plaintiff to be a licensee citing the *Kermarec* v. *Compagnie* decision in the Court of Appeals, 245 F. 2d 175 (the decision of this Court, 358 U. S. 625, reversing the Court of Appeals decision had not come down as yet). In rejecting the *Kermarec* dissent in the Court of Appeals decision, the Court in *Aho* made the very distinction between an invitee and licensee that this Court rejected in upholding the *Kermarec* dissenting opinion in the Circuit Court. The *Aho* case is the true example of rejected law that the Court below employed and which is now asserted by respondent.[4]

Although the decision by the Court of Appeals in *Aho* upheld the now rejected distinction between a licensee and

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[4] *Aho* v. *Jacobsen*, 249 F. 2d 309:

"The plaintiff in this appeal contends that he had a maritime right to cross from the inboard boat in order to reach his boat and that the defendant had an affirmative duty to keep her boat in a reasonably safe condition for the plaintiff's passage.' The plaintiff further contends that he was a business invitee, to whom was owed a duty of exercising due care.

(1) We must treat the plaintiff's complaint alleging damages resulting from defendant's negligence as one involving a maritime tort. The plaintiff's right of recovery is rooted in federal maritime law. *Pope & Talbot, Inc.* v. *Hawn*, 1953, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143; *Leathers* v. *Blessing*, 1881, 105 U. S. 626, 26 L. Ed. 1192. Massachusetts law is, therefore, not controlling in this case.

Plaintiff contends that a seaman who is forced to cross an inboard vessel in order to reach a pier is owed a duty of reasonable care by the owner of the inboard vessel. There is language

[Continued on page 8.]

invitee, the question of whether Aho was aboard the vessel for the mutual benefit of the owner and the defendant was raised and was rejected by that Court as immaterial. The reversal by this Court of the Court of Appeals decision in *Kermarec* clearly established that a person on board a

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[Continued from page 7.]

in *Anderson* v. *The E. B. Ware, Jr.*, C. C. E. D. La. 1889, 38 F. 44 to the effect that the master and owner of the inboard vessel owe a duty to members of the outboard vessel to see that they are not injured in crossing the inboard vessel because of the negligence of the master." (p. 311)

* * *

"In other recent cases involving maritime tort actions, alleging unsafe conditions aboard the shipowner's vessel, brought by persons other than the shipowner's employees or employees of independent contractors hired by the shipowner, it has been found necessary to determine whether the plaintiff was a licensee or invitee. This preliminary finding has been required in order to ascertain what standard of care is owed to the injured person." (p. 311)

* * *

"It is argued that plaintiff and defendant had a community of interest in that very possibly defendant's vessel might on occasion be in an outside position and it would be to the economic benefit of the owner for her crewmen to be able to cross the decks of the inboard boat. The extension of the status of business invitee to those who are on premises at a certain time for their own purposes and not for the purpose of having business dealings with the property owner has been widely accepted in certain circumstances. Usually, however, these cases concern premises open to the public such as shops where there is at least the present economic benefit to the owner of giving the invitee the opportunity of seeing and perhaps forming a desire for some of the wares on display. *Renfro Drug* v. *Lewis*, 149 Tex. 507, 235 S. W. 2d 609, 23 A. L. R. 2d 1114. In the instant case, plaintiff had no intent to do business with the defendant at any time in the future and, conversely, there is no indication that defendant could obtain any present or potential economic benefit from the plaintiff. The trial court was correct when it held that the plaintiff was a licensee as a matter of law." (p. 312)

vessel for the benefit of the shipowner and others was an invitee and entitled to reasonable care.

Petitioner herein was on the vessel for the mutual benefit of respondent and the shipowner. Evidence was offered on the very point and the record was proffered upon the Trial Court's ruling that it was inadmissible (120-123). Clearly, the evidence was material and admissible. Its rejection by the Trial Court was reversible error.

On page 18: There was no "twilight zone" when an accident occurred aboard a vessel, or any part thereof, located in navigable waters at the time. There was and is admiralty jurisdiction in this matter.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated: New York, N. Y., August 29, 1960.

Respectfully submitted,

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